

(2) In passing on any request for cross-examination submitted under paragraph (a) of this section, the Presiding Officer may, as a precondition to ruling on the merits of the request, require alternative means of clarifying the record to be used whether or not a request to do so has been made. The party requesting cross-examination shall have one week to comment on the results of using the alternative method. After considering these comments the Presiding Officer shall issue an order granting or denying the request for cross-examination.

(f) The provisions of §§124.85(d)(2) and 124.84(e) apply to proceedings under this subpart.

[48 FR 14264, Apr. 1, 1983, as amended at 49 FR 38052, Sept. 26, 1984]

#### **§ 124.122 Record for final permit.**

The record on which the final permit shall be based in any proceeding under this subpart consists of:

(a) The administrative record compiled under §124.9 or §124.18 as the case may be;

(b) Any material submitted under §124.78 relating to *ex parte* contacts;

(c) All notices issued under §124.113;

(d) All requests for hearings, and rulings on those requests, received or issued under §124.114;

(e) Any notice of hearing issued under §124.116;

(f) Any request to participate in the hearing received under §124.117;

(g) All comments submitted under §124.118, any motions made under that section and the rulings on them, and any comments filed under §124.113;

(h) The full transcript and other material received into the record of the panel hearing under §124.120;

(i) Any motions for, or rulings on, cross-examination filed or issued under §124.121;

(j) Any motions for, orders for, and the results of, any alternatives to cross-examination under §124.121; and

(k) The full transcript of any cross-examination held.

#### **§ 124.123 Filing of brief, proposed findings of fact and conclusions of law and proposed modified permit.**

Unless otherwise ordered by the Presiding Officer, each party may, within

20 days after all requests for cross-examination are denied or after a transcript of the full hearing including any cross-examination becomes available, submit proposed findings of fact; conclusions regarding material issues of law, fact, or discretion; a proposed modified permit (if such person is urging that the draft or final permit be modified); and a brief in support thereof; together with references to relevant pages of transcript and to relevant exhibits. Within 10 days thereafter each party may file a reply brief concerning matters contained in opposing briefs and containing alternative findings of fact; conclusions regarding material issues of law, fact, or discretion; and a proposed modified permit where appropriate. Oral argument may be held at the discretion of the Presiding Officer on motion of any party or *sua sponte*.

#### **§ 124.124 Recommended decision.**

The person named to prepare the decision shall, as soon as practicable after the conclusion of the hearing, evaluate the record of the hearing and prepare and file a recommended decision with the Regional Hearing Clerk. That person may consult with, and receive assistance from, any member of the hearing panel in drafting the recommended decision, and may delegate the preparation of the recommended decision to the panel or to any member or members of it. This decision shall contain findings of fact, conclusions regarding all material issues of law, and a recommendation as to whether and in what respect the draft or final permit should be modified. After the recommended decision has been filed, the Regional Hearing Clerk shall serve a copy of that decision on each party and upon the Environmental Appeals Board.

[48 FR 14264, Apr. 1, 1983, as amended at 57 FR 5337, Feb. 13, 1992]

#### **§ 124.125 Appeal from or review of recommended decision.**

Within 30 days after service of the recommended decision, any party may take exception to any matter set forth in that decision or to any adverse order or ruling of the Presiding Officer to

which that party objected, and may appeal those exceptions to the Environmental Appeals Board as provided in §124.91, except that references to the *initial decision* will mean recommended decision under §124.124.

[57 FR 5337, Feb. 13, 1992]

#### **§124.126 Final decision.**

As soon as practicable after all appeal proceedings have been completed, the Environmental Appeals Board shall issue a final decision. The Environmental Appeals Board may consult with the Presiding Officer, members of the hearing panel, or any other EPA employee other than members of the Agency Trial Staff under §124.78 in preparing the final decision. The Hearing Clerk shall file a copy of the decision on all parties.

[57 FR 5337, Feb. 13, 1992]

#### **§124.127 Final decision if there is no review.**

If no party appeals a recommended decision to the Environmental Appeals Board, and if the Environmental Appeals Board does not elect to review it, the recommended decision becomes the final decision of the Agency upon the expiration of the time for filing any appeals.

[57 FR 5337, Feb. 13, 1992]

#### **§124.128 Delegation of authority; time limitations.**

(a) The Administrator delegates authority to the Environmental Appeals Board (which is described in §1.25 of this title) to issue final decisions in appeals filed under this subpart. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this subpart to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and the rules in this subpart referring to the Environmental Appeals Board

shall be interpreted as referring to the Administrator.

(b) The failure of the Environmental Appeals Board, the Regional Administrator, or the Presiding Officer to do any act within the time periods specified under this part shall not waive or diminish any right, power, or authority of the United States Environmental Protection Agency.

(c) Upon a showing by any party that it has been prejudiced by a failure of the Environmental Appeals Board, the Regional Administrator, or the Presiding Officer to do any act within the time periods specified under this part, the Environmental Appeals Board, the Regional Administrator, and the Presiding Officer, as the case may be, may grant that party such relief of a procedural nature (including extension of any time for compliance or other action) as may be appropriate.

[57 FR 5337, Feb. 13, 1992]

#### **APPENDIX A TO PART 124—GUIDE TO DECISIONMAKING UNDER PART 124**

This appendix is designed to assist in reading the procedural requirements set out in part 124. It consists of two flow charts.

Figure 1 diagrams the more conventional sequence of procedures EPA expects to follow in processing permits under this part. It outlines how a permit will be applied for, how a draft permit will be prepared and publicly noticed for comment, and how a final permit will be issued under the procedures in subpart A.

This permit may then be appealed to the Administrator, as specified both in subpart A (for RCRA, UIC, or PSD permits), or subpart E or F (for NPDES permits). The first flow chart also briefly outlines which permit decisions are eligible for which types of appeal.

Part 124 also contains special "non-adversary panel hearing" procedures based on the "initial licensing" provisions of the Administrative Procedure Act. These procedures are set forth in subpart F. In some cases, EPA may only decide to make those procedures applicable after it has gone through the normal subpart A procedures on a draft permit. This process is also diagrammed in Figure 1.

Figure 2 sets forth the general procedure to be followed where these subpart F procedures have been made applicable to a permit from the beginning.

Both flow charts outline a sequence of events directed by arrows. The boxes set forth elements of the permit process; and the